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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 7

WILLIAM SCHNEIDERMAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (Clk.R. 105)[1] is reported at 235 Fed. 2d 146. The written opinions of the

[1]The clerk's transcript printed herein will be referred to as "Clk.R."; the reporter's transcript as "R."; the printed "Appendix to Appellee's Brief" as "A"; and the "Appendix to Appellants' Brief" as "App. Item". The last mentioned Appendix is made up of numbered items, and the number of the item referred to as well as the pages of the appendix at which it is found will be indicated in each instance. The original exhibits on file here will be referred to as "Ex." Both the "Appendix to Appellee's Brief", "A" and the "Appendix to Appellants' Brief", "App. Item" contain selected portions of the Reporter's Transcript and Exhibits.

District Court are reported in 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 737; 106 F. Supp. 892; 106 F. Supp. 906.

JURISDICTION.

The judgment of the Court of Appeals is dated March 17, 1955, and was entered on the same day. A petition for rehearing was timely filed and was denied on June 15, 1955 (Clk.R. 140). On the 27th day of June, 1955, the time for filing petitions for writ of certiorari herein was extended to and including August 13, 1955 by the order of Mr. Justice Frankfurter. The petition for certiorari was filed on August 10, 1955, and was granted on October 17, 1955 (100 L. Ed. [adv. Rep.] 69, ... U.S. .....). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent provisions of the statutes involved: 18 U.S.C. (1946 Ed.), Sections 10, 11; 18 U.S.C. (1948 Ed.), Sections 371, 2385; 50 U.S.C., Section 783(f); and the constitutional provisions involved; First, Fifth and Sixth Amendments, are set forth in the Appendix hereto.

QUESTIONS PRESENTED.

This brief is in support of the petition in No. 7 which is a companion petition to those numbered 6 and 8, this

term. The questions presented in those petitions and briefs are relied on by petitioner in No. 7. Additionally, petitioner presents these questions:

Whether the evidence was sufficient to support the conviction of petitioner of a conspiracy to violate the Smith Act.

Whether the Government was barred by the principles of *res judicata* and collateral estoppel to litigate again against petitioner issues decided adversely to the Government in *Schneiderman v. United States*, 320 U.S. 118.

STATEMENT OF THE CASE.

INTRODUCTION.

Petitioner in No. 7 is William Schneiderman, the same man (R. 11727) who was before this Court thirteen years ago when the Government sought unsuccessfully to cancel his certificate of naturalization (320 U.S. 118). In its landmark decision then, this Court laid down fundamental principles of constitutional law, at once in the special field of citizenship and denaturalization, and as well in the broad area of freedom of opinion, belief and expression.

Save for the element of conspiracy charged in the indictment below (Clk.R. 1), the Government proceeded here upon essentially the same charge against petitioner that this Court considered in 1943. Necessary components of the indictment below—Schneiderman's allegedly unlawful interpretation of the doctrines of Marxism-Leninism, and his asserted intent to bring about the forcible over-

throw of the Government—were in substance identical to the charge and proof in the first proceeding. The heart of the Government's proof in both cases—the books comprising the principles of Marxism-Leninism and said to contain the forbidden advocacy twice sought to be attributed to petitioner—was just the same.

A review of the evidence as it related to petitioner is thus essential in order properly to evaluate the fundamental argument made here that the principles of *res judicata* and collateral estoppel bar this proceeding. The review is as useful to support the further arguments that the evidence was insufficient to sustain petitioner's conviction of a conspiracy to violate the Smith Act, and that petitioner is fully entitled to a reversal of the judgment upon the several substantial points urged in briefs in companion cases hereto, upon which petitioner equally relies.

The trial Court permitted testimony of what petitioner has said and done over a period of almost two decades from 1934 to the time of trial. Since 1935, petitioner has been either the district organizer or the chairman of the Communist Party in California (R. 455; 3944; 5445; 11229; 12049, etc.). Necessarily, no little part of the record was devoted to petitioner, his views, his acts, his conversations, his speeches. A prosecution witness, one of fourteen paid by the F.B.I. to observe and to listen to the Communist Party and its chairman, informally summarized just about what the record as a whole was destined to show:

> "Q. Did Mr. Schneiderman speak at that meeting?
> A. Mr. Schneiderman spoke at every meeting."
> (R. 1176-7)

The same witness had just spelled out his meaning:

"Q. Mr. Schneiderman appeared there and spoke?

A. He appeared everywhere and he spoke everywhere, sir." (R. 4168).

Notwithstanding the great body of evidence concerning the petitioner, there was nothing in the few utterances attributed to him, as analysis shows, which could in any way sustain a finding of his connection with the conspiracy alleged in the indictment or of his possession of the proscribed specific intent. The "sharp conflict" (320 U.S. at 155) which this Court found in the record before it in the earlier proceeding involving petitioner, a conflict on the "crucial issue of advocacy of force and violence", and which the Court noted as a serious weakness in the Government's chain of proof there, was reduced here to no real conflict whatsoever by the lengthy examination below into what the petitioner did and said for seventeen years. There was practically no evidence, outside the books, against petitioner on the "crucial issue".

Although a precisely accurate account is neither possible nor necessary, it may be said that the record here contains reference to not less than fifty occasions[2] on

---

[2] 446 1338 4168 5440 7706
455 1688 4169 5445 7719
464 2031 4171 5500 7725
465 2034 4172 5527 7730
611 3571 4173 5590 7732
617 [illegible] 4375 5977 7806
620 3888 4378 6018 7814
621 3940 4391 6112 8061
679 3944 4669 6859 11733
975 4040 4674 7693 12645
1155 4166 4949

which petitioner attended a meeting, or made a speech, or engaged in a less formal conversation. Of these, on perhaps half a dozen occasions petitioner is alleged to have used language which, when distorted by being taken out of context, may arguably be said to be related to the charge of his having embraced the doctrine of advocacy of forcible overthrow of the Government. On the other hand, on at least half a dozen other occasions, his spoken or written words squarely and directly disavow any such advocacy whatever. On the remainder of the occasions, either he is not shown to have said anything at all, or what he said has no direct bearing on what this Court has called before the "crucial issue". On such occasions, his activities, speeches, or remarks—where any at all are shown—related exclusively to unquestionably lawful political activities of the Communist Party or of petitioner himself.

Examination of the details of the evidence in question will show a further significant distinction between the groups of occasions when petitioner is alleged to have said something claimed by the Government to support the charge that he engaged in the proscribed advocacy, and the occasions when he expressly disavowed it. In the case of the former group, the evidence of whether or not petitioner actually said the things he is asserted to have said is in the sharpest conflict. In the case of the latter group, the evidence is wholly free from conflict, and is uncontradicted that the disavowals of advocacy of force and violence were in fact made by petitioner. On at least two occasions the Government itself introduced the evidence (Exs. 21; 153).

Overt Acts.

Of 23 overt acts alleged in the indictment (Clk.R. 4 to 6) evidence was offered as to but one concerning petitioner within the three year period of limitations.

The sixteenth overt act reads: "On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting in Embassy Auditorium, Los Angeles."

Although the record is not clear that anything petitioner said on that occasion is in evidence (R. 8061-65), the inference is permissible that an account of his speech appears in the People's World for January 23, 1950 (Ex. 159-A; R. 8065-6).

From this exhibit, it appears that petitioner discussed "trade and recognition for the New China, or armed intervention" as a vital issue in the 1950 election. He said the people of California would want to know how Senator Sheridan Downey and Congresswoman Helen Gahagan Douglas stood on this issue.

It is plain at least that petitioner said nothing concerning the advocacy of forcible overthrow of the Government, and said or did nothing in furtherance of the conspiracy charged in the indictment. Had he done so, it could not have escaped official attention, since the witness who heard the speech attended the meeting as a secret informer for the F.B.I. and contemporaneously reported what he had heard to that agency (R. 8076).

The Government was constrained accordingly to turn far back in history to produce testimony from which it

could argue that petitioner believed and engaged in the proscribed advocacy.

Petitioner's Remarks:

1. Turning to the first group of incidents, the record shows the testimony of Nat Honig, a notorious and long time government paid informer. It was Honig's testimony that he and petitioner were in Moscow in 1934, petitioner as a representative of the American Communist Party to the Communist International (R. 7693). Petitioner, according to Honig, attended Communist International meetings, listened to reports from various countries, and reported to the American Communist Party about what he heard there.

Honig told of two asserted meetings in mid-June, 1934, at the Red International of Labor Unions and at the Communist International, where the chairman spoke of a report from the American Communist Party to the effect that the situation on the San Francisco waterfront at that time furnished an opportunity for a general strike. Petitioner, according to Honig, agreed that a general strike could be produced, and that such a strike would be an excellent rehearsal for seizure of power by the American Party, and that instructions to bring about such a general strike should go to the American Party (R. 7706; 7718).

Honig went on to describe a top fraction meeting in San Francisco in 1936, attended, according to the witness, by Harry Bridges and other waterfront union leaders. Petitioner is alleged to have reminded those present that he had learned in Moscow in 1934 that general strikes

are rehearsals for seizure of power by the Party and the working class, and that the situation then in 1936 was comparable to the one in 1934 and a further general strike could be produced (R. 7725; 7730).

Honig's account of these incidents lacks solidity and conflicts with historical fact. As the trial Court and jury were abundantly shown, and indeed as the witness himself necessarily conceded, the general strike in San Francisco in 1934 was under the direction of a special committee of the San Francisco Labor Council, headed by Edgar (sic) Vandeleur, George Kidwell, John O'Connell, and others, concededly none of them Communists (R. 8253-57). That strike grew out of a strike of longshoremen, whose demands had nothing to do with rehearsing for seizure of power, but were exclusively related to such matters as union recognition, union control of a hiring hall, a six hour day, a thirty hour week, a dollar an hour straight time and a dollar and a half for overtime, and fair working rules (R. 8237-38).

And the Communist Party, far from heeding the orders allegedly sent from Moscow, officially took an entirely different view of the general strike at the time. In a resolution adopted September 5, 1934 (R. 8628), its central committee said "it was the capitalist class which, in panic before the rising giant of class action of the workers, hysterically cried out that this which they could have settled very quickly at any time by the simple expedient of granting the workers' demands, was actually a revolutionary uprising organized by the Communist Party to overthrow the whole capitalist system. Of course, this strike did not have revolution as its objec-

tive, but only the immediate demands of the workers." (R. 8629; Ex. 738).[3]

In 1936, of course, there was no general strike in San Francisco—either to rehearse for a seizure of power or otherwise, nor does the record permit any other conclusion than that petitioner, the unions involved, the Communist Party, and the witness himself all sought to avoid a strike of any kind. Petitioner, according to the Western Worker of September 17, 1936 (Ex. I; R. 1155) said in a radio speech in which he discussed a "part of the California program of the Communist Party in the 1936 election campaign" that:

> "The Communist Party declares that it does *not* advocate or condone the use of force and violence; on the contrary this is the method used by the enemies of labor, by the provocateurs sent into the workers' ranks, by strike breakers and vigilantes.
>
> The Communist Party is not interested in strikes for their own sake. We know full well how costly strikes are for the workers, and their families.
>
> In the present waterfront situation, we hope, as do all friends of labor, that the threat of a strike or lockout will be averted through negotiations and a peaceful settlement, which will take into consideration the just demands of the maritime unions." (R. 1161).[4]

---

[3]The resolution is set forth in greater detail in App. Item 98, p. 368.

[4]The attitude of the maritime unions at the time was ably set forth in a report subsequently issued by the Bureau of Labor Statistics of the Department of Labor, entitled "The Maritime Strike of 1936-37" (Ex. IC). The Labor Department report said:

> "When no agreement could be reached on these proposals, the longshoremen's union announced its willingness to with-

Honig himself had a different view of the matter in 1936. As editor of the same Western Worker (R. 8373), Honig caused an editorial to be printed in September 1936 which said in part "the unions have done everything possible to settle the issue through peaceful negotiations, but the employers are forcing the struggle upon them" (R. 8295-6, 8302-4; Exs. ID and IE).

Honig had been a witness in the 1941 proceedings which looked to the deportation of Harry Bridges on the ground of alleged membership in the Communist Party (R. 8489) (Cf. *Bridges v. Wixon*, 326 U. S. 135). While at that hearing he testified about this alleged 1936 top fraction meeting, it is significant he said nothing about rehearsals for seizure of power (R. 8514-16). Despite the peculiarly compelling circumstances in the *Bridges* case, to produce such testimony, the witness had but the lamest excuse below for not having told the story before. He said he didn't consider that he had "an opportunity" to tell it, though he had been asked to repeat all the topics discussed in such 1936 meetings (R. 8514, 8526).

2. The next incident in the first category involving petitioner took place in 1945. The prosecution witness on this occasion was one Daisy Van Dorn, who ran an elevator in the building in which the Communist Party then maintained its offices (R. 7765-66), and informed for the F.B.I. on the side (R. 7765). Since other petitioners were equally involved in this incident, the witness's account of a reception given for one Mother Bloor in San

---

draw its demands and continue under the existing award, providing the operators would withdraw their proposals. This offer was rejected, the employers insisting that their proposals be incorporated in a new agreement". (R. 8292.)

Francisco during the United Nations Conference is set forth at length and dealt with in argument in the brief in number 6, and will not be repeated here.

However, with respect to petitioner, Mrs. Van Dorn said that on the next day he told her to keep to herself the remarks made by the aged Mrs. Bloor at the reception, that he did not want the information to go through the Party, and that it was not for the rank and file (R. 7817). Mrs. Van Dorn, who had joined the Communist Party one month earlier and held no office therein, agreed that she was of the rank and file and gave no explanation of why she should have received such highly confidential information (R. 7998).

The evidence is uncontradicted that the reception in question was held pursuant to printed invitation, and that it was attended by numerous non-Communists (R. 7991-94).

3. The same witness identified a book (Exhibit 251), which she said petitioner told her to guard with care, because it had been smuggled into this country from Russia (R. 7806-7). It was established beyond question, however, that the book passed regularly through Customs for sale in bookstores in the United States (Exs. HT-1, HT-2; R. 11132), and that copies, purchased from a London bookseller, were on the shelves of the Los Angeles Public Library (R. 8033).

4. In February, 1946, according to another prosecution witness, petitioner spoke concerning the convention that had reconstituted the Communist Party following the dissolution of the Communist Political Association. In

the course of these remarks, petitioner is alleged to have stated that the Party was "being reconstituted toward a purely Marxist-Leninist line". He is said to have assured the members present that the Party was embarking on a purely Marxist role, "which was the playing of a revolutionary role in society" (R. 4375).

However, the same witness learned in Communist Party classes that, according to Marxism-Leninism, revolution meant a change from capitalism to socialism (R. 4913). The trial Court took the same view, instructing the jury, *inter alia*, that ". . . revolution does not necessarily involve force and violence" (Instr. J; App. Item 2-M, p. 56).

5. Another incident in the first category is said to have occurred in February, 1947. Government witness William Foard testified that petitioner spoke at a Communist Party meeting in San Francisco on left sectarianism and right deviations. The proof of this incident is considerably weakened by the fact that the record reflects grave doubt as to whether the meeting the witness described was in fact ever held.

Foard professed to be certain that petitioner's speech was made at the second of two meetings held by the Party in that same period and at the same hall (R. 4893-4896; 4899). While the record is uncontradicted that one of these, a public affair identified in the record as the "Williamson" meeting, was actually held,[5] the witness insisted that this was not the same meeting at which

[5]Exs. EZ, FA, FB, FC, FD and FE; R. 4892-93.

petitioner spoke (R. 4896). But the original rental card of the building shows unmistakably that only one meeting was held by the Communist Party during the months of January, February and March, 1947 (Ex. ML; R. 11584). Since that one was indisputably the "Williamson" meeting, Foard's recollection of the entire incident lacks weight.

Under this cloud of doubt as to his credibility, the witness Foard testified that petitioner told the meeting that the Party was still on the Marxist-Leninist line. He said the expelled left sectarians (see brief in 6 herein) were like the horse that is too far ahead of the cart, that they were impatient, that they wanted the Party to embark on adventurous campaigns, that they criticized the Party for not being revolutionary. He assured the members that "we were", that before the revolution can be thought of the Party must first build a mass base among labor, farmers and minority groups, that revolution is a serious business and not something to shrug or laugh off.

Petitioner is supposed to have said further at this February, 1947, meeting that revolution means tragedy and bloodshed and that he doubted if many Party members were ready for revolution; that it meant sacrifices, loss of property, person and life, but that these were expendable to achieve the goal of socialism. "The Party was just not prepared for revolution and the majority of the members of the Party weren't conscious of the seriousness of it". Petitioner is said to have gone on to say, at that meeting, that the ultimate goal of the Communist Party was the establishment of socialism and that this could only be done through violent revolution, that "the masters

of finance capital would never give in without a fight". He is said further to have criticized Browder for having tied the Party to "the coat of the bourgeoisie", that Browder had anesthetized the revolutionary potential of the Party. He is said to have added that there were still many Browder deviations in the Party and that a new education campaign was needed to get rid of them (R. 4378-81).

All this was cast in a new light, however, when Foard testified to his own training in Marxism-Leninism while in the Communist Party: that a transition however accomplished from capitalism to socialism would be a "drastic change" and hence a revolution; that if some part of the process would be violent, this would be because the minority would not permit the majority to effect such a change peacefully (R. 4912-13). The witness' testimony further confirmed that everything he attributed to petitioner at the February 1947 meeting was consistent with the prediction (not the advocacy) within the Party that when the majority of the American people should exercise their free choice to establish socialism, a minority would not be willing to accept such a change peacefully.

These, then, are the few incidents to which the Government may point, and indeed did point below, to establish petitioner's adherence to the doctrine of advocacy of forcible overthrow of the Government, his connection with the conspiracy charged in the indictment, his intent to bring about the overthrow of the Government by force and violence, all the necessary elements of the offense. None occurred during the period of the Statute of Limitations, December 21, 1948, to December 21, 1951.

Petitioner's Express Disclaimers of Prohibited Advocacy.

This pitiful handful of occasions and remarks is matched by as many in which petitioner is shown in the record consistently to have disavowed the doctrine of advocacy of overthrow of the Government by force and violence.

1. His entire testimony in the District Court in *Schneiderman* was admitted in evidence here (Exs. MM-1 and MM-2).[6] In it he acknowledges his belief in the "essential correctness" of Marxism-Leninism (Ex. MM-1, p. 108) which he said he regarded as a philosophy and science of "politics, economics and social forces" (*id.*, p. 108). As to the Communist Party, he testified, his "understanding and interpretation" of its "program, principle and practice" was as "enunciated in its constitution" (*id.*, p. 365), which as an exhibit to the pleadings there demonstrates a rejection of force and violence as instruments of social change. He explained why he believed the charge made against him, the Party and the doctrines of Marxism-Leninism was a false one.

> "The Communist Party of the United States of American has frequently been accused, as charged in the present Government suit, with advocating force and violence, or advocating the overthrow of the United States Government by force and violence. The basis of these accusations and charges are alleged to be quotations from writings of a whole school of thought known as Marxism, Leninism, or Marxism-Leninism. The accusations and charges misinterpret and distort the position of the Communist Party and

[6]It was rejected, however, on the issue of res judicata and collateral estoppel.

its members in two ways: first, by taking a quotation out of its context without regard to the rest of the context and without regard to the historical conditions and forces in existence at the time the quotation was written or in relation to the period about which it was written, and without regard to the country or countries about which it was written and without regard to the fact that such writings or quotations are generalized theoretical conclusions about general world affairs.

"The second way in which these writings or quotations are misinterpreted in so far as the principles of the Communist Party and its members are concerned is by accepting in toto the individual interpretations of the author or writer as the official position of the Communist Party. While such writings may be and are regarded as contributions for discussion and study, as interpretations of the theory and practice of Marxism and Leninism, these writings may be and are at times in conflict with the principles and generally accepted practices of the Communist Party and its members, and these writings may distort the true position of the Party. Thus, by these means, it is possible to read into a phrase, a quotation, or even a whole book or document, interpretations contrary to the principles and practices of the Communist Party, by those who do not understand the philosophy and political theories of Marxism and Leninism and its application by the Communist Party of the United States of America." (*id.*, p. 368-71.)

He also testified:

"Revolution cannot be imported to one country from another. Neither can it be imposed on any people or any country by the arbitrary will or advocacy or

incitement of any group or party. The transformation of society from one stage to another has taken place in different ways in different countries within the general laws defining historical development. Its reorganization on a socialist basis will likewise have different characteristics, forms and methods within these general laws in each country in accordance with its own special characteristics. Any attempt to draw a mechanical comparison between America and other countries would be contrary to our whole method of Marxist-Leninist analysis." (*id.*, p. 378-79.)

For himself and the Party he specifically and categorically denied the charge made:

"Q. And your organization and you, yourself are striving, through peaceable means, to effect the alignment of the majority of the people in the United States with the views of your organization?

A. That is correct." (R. 12066-7.)

"Q. Do you believe that it will be possible to bring about this socialization by democratic processes in this country?

A. Yes, I do; and I certainly hope so." (Ex. MM-2, p. 867.)

This testimony was given, as reflected by those exhibits, in 1939 (R. 11727), and necessarily demonstrated his state of mind both at that time and as of his naturalization in 1927.

2. More, the record shows, and without contradiction, that he held the same views, of Marxism-Leninism, of the Communist Party's advocacies, and of the doctrine of overthrow of the Government by force and violence, in 1943, and 1951 (R. 11729, 11733). It appears from the

record that petitioner attended a special conference in San Francisco in June, 1943, following a few days after announcement of this Court's decision in *Schneiderman*. Petitioner at that conference described the decision of this Court as an important victory for citizenship rights and civil rights generally, and moreover said that it confirmed many of the teachings of the Party and positions which the Party had taken. He said then he believed the decision upheld his own views of the teachings, activities and theories of the Party which he had given in his own testimony (R. 10957-61).

3. In the fall of 1951, petitioner had a conversation with Oleta O'Connor Yates, one of the petitioners in No. 6. He told her that he thought that a study of the transcript of his testimony in *Schneiderman* would reveal that the issues there were the same as the issues here, and that the books and material dealt with by the Supreme Court were the same that the prosecution would introduce upon the trial of this cause (R. 11733).

Accordingly, from 1927 to 1951, petitioner, when he could be heard, held the view that:

> "The Communists do not desire the use of force and violence. We desire and strive for peaceful and democratic means of removing exploitation and oppression." (Ex. MM-1, p. 373, R. 11926-27.)

4. David Saunders, a Government witness, told the Court below he left the Communist Party because of his disagreement with petitioner. Saunders accused the petitioner, and those who agreed with him, in 1945 "of watering down the version of Marx so it no longer stood for the overthrow of the Government" (R. 975-6). When

petitioner refused to agree with Saunders that the proper course was "open stand up militantly as Communists until we got what we stood for and let the chips fall where they may on that" (R. 1079-80); Saunders quit.[7]

5. Petitioner was elected a delegate to the 1945 National Convention of the Party (R. 621; 2047). At that convention, following which petitioner was re-elected to his position as head of the Party in California (R. 455), the Party adopted its Constitution (Ex. 21, R. 5117).[8] At the 1948 Convention, equally attended by petitioner (R. 2047), further sections were added, the Party thus at both conventions stating its official position on advocacy of force and violence. The Party expressly disclaimed any such advocacy or goal:

> "Section 2: Adherence to or participation in the activities of any clique, group, circle, faction, or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be published by immediate expulsion." (1945 Const. Ex. 21, R. 5117.)

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[7] See the brief in No. 6 for a more extended account of the unremitting struggle waged by petitioner and others against such "leftist" Party members as the witness. The fundamental issue between the two groups was the successful resistance by petitioner and others to the program of the "leftists", who urged that the immediate overthrow of the capitalistic system, and the establishment of socialism, without first winning a majority of the American people to socialism, ought to be the order of the day and the program of the Communist Party (R. 4456, 4674-4708). By overwhelming vote, the "leftists" were expelled for their anti-party activity (R. 4391).

[8] The 1938 Party Constitution, concerning which petitioner testified in *Schneiderman*, was in essential particulars no different from the 1945 and 1948 documents.

"Section 3. Any member shall be expelled from the Party who is found to be a strikebreaker, provocateur, engaged in espionage, or who advocates force and violence or terrorism, or who adheres to or participates in the activities of any group or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy through which the majority of the American people can maintain their right to determine their destinies."

"Section 9. Members are obligated to fight with all their strength against any and every effort, whether it comes from abroad or within our country, to destroy the rights of labor and the people, or to impose upon the United States the arbitrary will of any group or party or clique or conspiracy, thereby violating the unqualified right of the majority of the people to direct the destinies of our country." (Added, 1948 convention, Ex. 153, R. 2089.)

6. During the period covered by the statute of limitations, petitioner is shown by the record to have attended a number of meetings (R. 5446), and spoken publicly at others (R. 3571, 8061-3) without any indication of what he said, although each of these had F.B.I. observers in attendance (R. 3523, 4925). At only one of these does the record disclose any indication of the contents of petitioner's talk. In May, 1949, he spoke at San Diego (R. 1338). The witness who told of this, Lloyd Hamlin, also on the payroll of the F.B.I. (R. 1321), said petitioner spoke "on behalf of the leaders of the Communist Party who were indicted in New York" (R. 1344), may also have discussed peace, possibly also this Court's opinion in *Schneiderman*, perhaps stating the Court had held the

Communist Party not to be an advocate of the overthrow of the Government by force and violence (R. 1688-90).

The record is otherwise not significant upon the "crucial issue". Petitioner spoke at a great variety of meetings, and upon a considerable variety of subjects; he was repeatedly introduced and otherwise identified as the State Chairman of the Communist Party in California. Most of his appearances, whether in public or in more private meetings of the Communist Party, were evidently under the close scrutiny of secret informers and agents of the F.B.I. (See, e.g., R. 3523, 3761, 4925.) Had petitioner covertly or openly, during this extended period concerning which evidence was permitted by the trial court, urged anyone to agree with him to plan the advocacy of the overthrow of this Government by force and violence, as speedily as circumstances would permit or at any other time, it is inconceivable that this recommendation would have failed to have found its way into the record here. The inescapable conclusion is that petitioner never did, and never urged another to, engage in the proscribed advocacy.

SUMMARY OF ARGUMENT.

The evidence of petitioner's unlawful intent, and of his connection with the conspiracy charged in the indictment, did not meet the standards required by this Court to sustain convictions in the area of the First Amendment. The evidence failed even to meet the requirements imposed by the trial Court in his instructions, and the trial Court

erred in its refusal to grant petitioner's motion for judgment of acquittal.

The evidence adduced showed only that petitioner held office (and membership) in the Communist Party, that he participated in its lawful activities, and that in a few isolated instances he used language which, while concededly not directly advocating overthrow of the Government by force and violence, may where distorted out of context arguably be said to permit the inference that he subscribed to that prohibited doctrine. The evidence of these instances, all from paid informers or from malcontents who left the Communist Party, lacked the necessary weight and solidity to support petitioner's conviction.

The Government was barred by *res judicata* and collateral estoppel from litigating again against petitioner his alleged adherence to forcible overthrow of the Government by reason of his belief in the principles of Marxism-Leninism, and circulation and publication by the Communist Party of the basic books comprising Marxism-Leninism.

The same books relied on by the Government in *Schneiderman v. U. S.*, 320 U.S. 118, were again introduced in evidence here. The only additions were other Marxist-Leninist books which said substantially the same things. Both petitioner and co-petitioner Yates in No. 6, testifying in 1939 and 1952, respectively, established that they understood Marxism-Leninism to mean at least what this Court said it meant in *Schneiderman*.

The Government litigated the alleged meaning of this doctrine and these books once before against petitioner

and may not be heard again to depend upon its interpretation of the same books and doctrine as constituting the prohibited advocacy when it lost on that issue in this Court before.

Res judicata and collateral estoppel do not depend upon identity of evidence, and are applicable notwithstanding that the earlier proceeding was of a different form.

In its rulings on motion to dismiss the indictment, on the admissibility of evidence, and on motion for judgment of acquittal the trial Court erred in excluding entirely from the case any consideration of the application of the principles of *res judicata* and collateral estoppel.

ARGUMENT.

I.

THE EVIDENCE WAS NOT CLEAR, CONVINCING AND UNEQUIVOCAL, IT LACKED SOLIDITY, AND HENCE WAS INSUFFICIENT TO ESTABLISH PETITIONER'S CONNECTION WITH THE CONSPIRACY CHARGED IN THE INDICTMENT, AND HIS SPECIFIC INTENT TO ADVOCATE AND TO BRING ABOUT THE OVERTHROW OF THE GOVERNMENT BY FORCE AND VIOLENCE.

Decisions of this Court leave no room for doubt of the tests of the quality of evidence requisite to sustain a conviction of a crime that invades the area shielded by the First Amendment. The Smith Act, of course, is such a statute (*Dennis v. United States*, 341 U.S. 494).

This Court said in *Hartzel v. United States*, 332 U.S. 665, 686:

"... such legislation, being penal in nature, and restricting the right to speak and write freely, must

be construed narrowly, and 'must be taken to use its words in a strict and accurate sense' . . .".

In *Dennis,* the Court noted that the Constitution requires a conviction under the Smith Act to be reviewed with "scrupulous care" when there is doubt as to the quantum and quality of proof of a defendant's intent, the nature of his activities, and his power to bring about the evil proscribed by Congress. The test was unanimously approved a year later in *Stack v. Boyle,* 342 U.S. 1.

In parallel, though not penal cases (if anything, requisite proof beyond a reasonable doubt would be still more exacting in penal cases) the Court in *Schneiderman v. United States,* 320 U.S. 118, held evidence to punish in the area of opinion and belief need be "clear, convincing and unequivocal".

Citing and approving *Schneiderman,* the Court a year later in *Baumgartner v. United States,* 322 U.S. 665, unanimously spoke of the requirement of "solid proof", "weighty" proof, "compelling" proof, when the issues involve belief. The Court warned that, deciding such issues, "proof is treacherous and objective judgment, even by the most disciplined minds, precarious" (322 U.S. at 675). Although the evidence in both *Hartzell* and *Baumgartner* appeared to be of a more substantial character than the evidence herein, the Court in both cases held it fell short of the searching tests required by the First Amendment in the areas of belief and opinion. The Court in *Baumgartner,* "putting the Government's case in its most favorable light", found that it "lacks that solidity of proof which leaves no troubling doubt in deciding a

question of such gravity. . . ." 322 U.S. at 670. The Court rejected as insufficient evidence "established by . . . expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory. . . ." (*id.* at 675). The Court required evidence more "compelling" to impose the penalty sought by the Government there (*id.* at 677).

The evidence against William Schneiderman, in whose earlier case this Court defined with care the quality of proof the First Amendment demands, does not meet the high and stringent standards the Court has established. It wholly fails to establish petitioner's specific intent either to advocate or to bring about overthrow of the Government by force and violence, or his connection with the conspiracy alleged in the indictment against him.[9]

The Government was required to prove, beyond a reasonable doubt and by rigorous standards, that petitioner had not alone the specific intent to conspire with others to advocate that his Government should be overthrown by force and violence, but the further specific intent to bring about that event just as speedily as circumstances would permit. This intent is petitioner's state of mind, what he believed, where "proof is treacherous, objective judgment . . . precarious".

The direct evidence on the question is all against the Government. Petitioner's own statements, declarations

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[9]The Court in *Hartzell*, held statutory use of the word "wilfully", in a "highly penal statute restricting freedom of expression", to require proof of a specific intent to do "deliberately and with a specific purpose" the acts proscribed by Congress. The indictment here equally charged petitioner with having "wilfully" conspired (Clk.R. 2).

and affirmations of what he had in mind, what he intended, concerning the forbidden advocacy, uniformly disavowed it. His testimony in the earlier proceeding is direct, unequivocal, free from any doubt. That testimony creates more than a conflict on one of the "crucial issues" here. Rather it creates an insuperable obstacle to the Government's effort to establish by other evidence that petitioner held the prohibited specific intent.

More, the record shows without contradiction that petitioner's own understanding of Marxism-Leninism,[10] what he believed in when he believed in its principles, was unchanged from his naturalization in 1927 to and after the return of the indictment in this case in 1951. On each occasion, over this 24 year period, (in 1939 when he testified in the District Court, in 1943 after this Court's decision, possibly again in 1949 in a speech in San Diego, still again in 1951) petitioner expressed his convictions to be the same. Unswervingly, these were that Marxism-Leninism did not represent, and neither he nor the Communist Party advocated, forcible overthrow of the Government. Thus, the positive, the direct, what petitioner undeniably himself has said about his intent.

Aside from the books comprising Marxism-Leninism, discussed elsewhere in this and companion briefs, and the series of inferences from petitioner's membership and office in the Communist Party, similarly discussed, the evi-

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[10]The only one that is important, according to the instructions of the trial Court:

"You should bear in mind that it is not your own understanding of the meaning of the language of an exhibit, but the defendant's understanding of the meaning of such language that is to be considered in arriving at your verdict." (Instruction No. 14-J 2, R. 13765-6.)

dence on which the Government may rely as proof of petitioner's criminal intent consists of meagre, unrelated and inherently unsubstantial scraps. Together or separately, they wholly lack that "solidity of proof" the Court has held essential.

Remote and Insubstantial Evidence.

The first of these fragments of evidence, in point of time, is found in the testimony of the witness Honig, who told of purported meetings and discussions in Moscow in 1934, relating to the general strike in San Francisco in that year. Honig equally testified to a meeting in 1936 at which petitioner is asserted to have sought his listeners again to bring about a general strike in San Francisco, once more as a supposed "rehearsal for seizure of power".

The events said by the witness to have taken place occurred, if they occurred at all, twelve and fourteen years before the statute of limitations commenced to run upon the charge laid in the indictment, and four to six years before the Smith Act itself was enacted.

It is not clear upon what theory the trial Court admitted testimony of such ancient vintage. The Court told the jury that they could consider, as to any defendant, evidence of events before 1940 only to determine the membership of any such defendant in the Communist Party and whether he had *knowledge* of the Party's nature, character, aims and objectives, and what it may have taught and advocated "during the period covered by the indictment" (Inst. 14-G, App. Item 2-K, p. 47).

But knowledge is not intent. The two are readily distinguishable (*Haywood v. United States*, 268 F. 795, 806).

Even assuming, arguendo, some bearing of the testimony on petitioner's intent at the time of the alleged transactions, it cannot show his specific intent to violate this statute which was enacted so much later.

> "It cannot be presumed that a state of mind, entirely lawful at the time and not accompanied by expressions showing the willingness to violate law, will change into a criminal intent under a future statute (citing cases)". *Wolf v. United States*, 259 F. 388, 393.

See also *Kammann v. United States*, 259 F. 192.

Of equal importance, the evidence itself grossly fails to meet the exacting standards established by this Court for proof in the area of opinion and belief. Directly contrary to the facts of history, and to all of the objective evidence available with respect to the events concerning which the conversations are said to have related, the testimony is neither weighty, compelling, nor solid. The testimony reflects the anticipated effect of eighteen years the "self-deluding medium of memory".

The objective and undisputed evidence shows that the general strike in San Francisco in 1934 was led by known conservative A.F. of L. leaders. It resulted in arbitration of the underlying maritime strike, and the arbitration accomplished evidently seriously needed, and purely economic gains for the workers. The purpose of the industrial dispute, seen from contemporaneous accounts in the record, and seen in the light of history, was wholly and exclusively economic. It had nothing to do with any "rehearsal for seizure of power". There is no evidence whatever in the record that any participant in the 1934 controversy in San Francisco, whether Communist or not, ever

viewed the strike as for any other than its stated purposes, which were lawful and largely accomplished.

Honig's account of the asserted 1936 discussion, which he said looked to another general strike for another "rehearsal for seizure of power" is, if anything, still more unstable. Here the evidence, without dispute, shows that no general strike took place in 1936, nor was it ever proposed either by the unions or by the newspaper which the witness himself edited and which he said was controlled by the Communist Party. The objective evidence further shows that a strike of any kind was strenuously opposed both by the labor unions involved, by the Communist Party, and by petitioner himself.

Finally, on these incidents, the testimony of the witness loses all weight, compulsion, and effectiveness by the witness' admitted failure to have recounted the events when he had every opportunity and occasion to do so ten years earlier. In 1941 the witness testified for the Government in the proceedings looking to Bridges' deportation.

Then, eleven years closer to the putative meeting, Honig said nothing of such a proposal by petitioner. Honig's reason here for having omitted this important bit of testimony is not convincing.

He first testified:

> "Q. Then your recollection is that if you did not testify to such a meeting [in the Bridges case], it was because you were given no opportunity to testify to it, is that right?
>
> A. That is right, yes." (R. 8516).

Yet, when pressed, the witness recalled that he was asked the following questions in the *Bridges* case, and that

they related to the same alleged top fraction meeting at which petitioner is supposed to have spoken of a "rehearsal for seizure of power":

> "Now, tell us, if you will, some of the specific topics that were discussed at any of these meetings."

And again: "Give me anything you can remember about any of these meetings."

These questions, from the *Bridges* case transcript, were read to the witness here (R. 8526). With respect to the latter of the two questions the record shows:

> "Do you remember being asked that question?
>
> A. Yes.
>
> Q. And did you consider the question, 'Give me anything you can remember about any of these meetings', gave you an opportunity to tell about the general strike and the dress rehearsal for revolution?
>
> A. I considered it was not a proper occasion for me to do so." (R. 8526).

Honig, who has testified for the Government in a number and variety of proceedings, revealed other instabilities as a witness. Unwilling to admit serious discrepancies between his testimony in different proceedings, he sought below to attribute the differences in errors in reporting. By soundscriber played to the Court and jury, these asserted errors were conclusively established to be nothing of the kind (Compare R. 10771 with R. 8371, and compare R. 10767 with R. 8413). He also manifested a tendency to tailor his testimony to suit the proceeding. Thus he testified here that petitioner, removing one Carlisle from his post as editor of the Western Worker, criticized Carlisle for a "dilettante attitude", inconsistent with the as-

serted ultimate aim of the Party to bring about a revolution in the United States (R. 7732). But in an earlier proceeding in which the Government sought to establish Carlisle's prohibited advocacy, Honig of course said nothing about a dilettante attitude. This is not clear, convincing, compelling, weighty proof.

Evidence of Criminal Intent Wholly Inadequate.

Other witnesses told of petitioner's remarks in 1945 to the effect that the Communist Party was "going back" to the principles of Marxism-Leninism. Again petitioner is said to have spoken with approval of the "revolutionary role" in society which he said the Communist Party was destined to play. But these speeches of petitioner, on the record here, are not evidence at all of his specific intent to advocate or bring about forcible overthrow of the Government. Clearly, as proof of such specific intent, they wholly lack weight, compulsion, solidity.

Petitioner's testimony in *Schneiderman* demonstrates with considerable precision what petitioner understood by his use of the terms Marxism-Leninism, and revolution. By revolution, petitioner by his own statements, specifically intended a peaceful fundamental change from capitalism to socialism.

In any event, no criminal significance may be attached to petitioner's discussion of the concept revolution. It is presumed that the jury followed the trial Court's instructions in this regard:

> "The term (revolution) implies the fundamental character of the change sought, without reference to the means contemplated to achieve it. It may or may not be accomplished by the use of force and violence. In

other words, revolution does not necessarily involve force and violence." (Instr. 14-J; R. 13765).

The law of the case thus forbids the very inferences the Government would draw concerning petitioner's specific intent from his speeches in 1945 and 1946.

Turning next to 1947 the record is in the sharpest conflict as to whether a meeting was ever held at all at which the witness Foard attributed to petitioner remarks arguably more susceptible of a sinister construction. As has been seen from the record, Foard was very sure of both the time and place of the meeting when the speech was supposed to have been made. But the business records of the place showed clearly that no such meeting was held. A fundamental conflict of this character, particularly when compared to the kind of evidence considered by the Court in *Baumgartner* and *Hartzell*, itself takes from this evidence its essential qualities of solidity and weight.

Moreover, Foard's own account of petitioner's alleged speech, even if believed, shows that petitioner did not advocate, but at the most predicted, violence. Foard says petitioner declared there would be violence because "the masters of finance capital would never give in without a fight" (R. 4380). This Court dealt before with exactly that proposition, and as it related to petitioner's specific intent or state of mind. The Court said in *Schneiderman:*

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—predic-

tion that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." (320 U.S. at 157).

The trial Court agreed and established the law of the case. "Prediction or prophesy is not advocacy," he told the jury (Instr. 12-A; App. Item 2-F, p. 32).

Finally, consideration of these few and isolated instances must be had in the light of the record as a whole. Surely, if petitioner had in fact intended to advocate forcible overthrow of the Government, then at some time during the lengthy period covered by the testimony concerning him, a period in which he appeared everywhere and spoke everywhere, and in which hidden informers of the F.B.I. were in constant attendance upon his remarks and activities, he would have said so at least once. The whole record compels the inference that petitioner did not in fact have either specific intent essential to his conviction.

II.

THIS PROCEEDING IS BARRED, AT LEAST AS TO THIS PETITIONER, UNDER THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

A. The decision in Schneiderman v. United States, 320 U.S. 118, concluded the government with respect to the issues it seeks to litigate here.

The primary and determinative factual issues raised by the prosecution's theory of the case here are (1) whether the teaching of Marxism-Leninism by the Communist Party is necessarily the same as the advocacy of the vio-

lent overthrow of the government; and (2) whether, by virtue solely of his membership and officership in the Communist Party plus his participation in its legal activities, a reprehensible interpretation of Marxism-Leninism may be fastened upon petitioner.[11] However, these very factual isues were determined favorably to petitioner in *Schneiderman v. United States*, 320 U.S. 118.

In that proceeding the government sought to prove its charge that Schneiderman was a member of and believed in the principles of an organization which "advised, taught and advocated the overthrow of the government of the United States by force and violence" (App. Item 100, pp. 375-377)[12] by proof that the organization, the Communist Party, circulated and distributed Marxist-Leninist literature and sought to indoctrinate persons in Marxism-Leninism. The evidence in that proceeding, as in this, consisted

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[11]The indictment (Clk. R. 1-6) charges that Schneiderman wilfully conspired with others to violate the Smith Act by "advocating and teaching the duty and necessity of overthrowing the government of the United States by force and violence . . ." and by "organizing . . . a society [to] teach and advocate" such overthrow. It alleges that it was part of this conspiracy that clubs of the Communist Party would be organized, meetings had, literature published and distributed, and classes conducted in which persons "would be indoctrinated in the principles of Marxism-Leninism."

As is pointed out in the opening brief being filed in *Yates et al. v. United States*, this Term No. 6, an essential step in the prosecution's chain of inferences is that the advocacy of the doctrines of Marxism-Leninism is necessarily the advocacy of forcible and violent overthrow of the government of the United States.

[12]The item cited in the text above from the Appendix to Appellants' Brief, and those items immediately following (101-105), contain excerpts from the record in *Schneiderman v. United States*, 320 U.S. 118, as it appears in the files and records of the court below. The same record of course is contained in the files and records of this Court, No. 2, October Term 1942. These records, offered as Exhibits MM3, MM4, and MM5, were not received by the trial Court (R. 125:28-30).

largely of excerpts from the so-called "classics" of Marxism-Leninism which were offered to support the contention that this doctrine must be equated with forcible overthrow of government.

It is our position that this Court's decision in *Schneiderman* determined for purposes of this proceeding (1) that the teaching of Marxism-Leninism by the Communist Party was not necessarily the advocacy of violent overthrow of government; (2) that at least one tenable conclusion to be drawn from the evidence was that the Communist Party desired to achieve its goal of socialism peaceably and by the ballot; (3) that it could not be presumed, merely because of his membership or officership in the Communist Party, that Schneiderman adopted an illegal interpretation of Marxist doctrine; and finally, (4) that absent proof of overt acts indicating that Schneiderman personally adopted a reprehensible interpretation, the government had failed to establish its burden by the clear and unequivocal evidence necessary in a denaturalization case.

Since these factual issues had been conclusively determined between the parties, they should have been so treated upon the trial of this case. But they were not. Motions to dismiss based upon this point were denied (Clk. R. 33, 41); objections to the introduction of Marxist-Leninist books were overruled (R. 516); motions to strike such evidence were denied (R. 731; Clk. R. 63-64); proposed instructions to the jury covering the point were refused (Dfs. Prop. Inst. Nos. 70 and 71; Ex. NC-1; App. Item 2(q), p. 79); the Court refused to receive Schneiderman's testimony in the prior proceedings on the issue of *res judi-*

cata (R. 12,531), and the jury was specifically instructed that *Schneiderman* had not determined "*any of the issues* raised by the indictment here" (Inst. No. 11J1, R. 13,749, App. Item 2(f), p. 30).

These erroneous rulings of the trial Court require at least a reversal of the judgment of conviction, if indeed the government is not precluded altogether from relitigating the issues previously decided.

In its brief in opposition to Schneiderman's petition for the writ here, the government, citing *Sealfon v. United States*, 332 U.S. 575, said that "none of this Court's conclusions in *Schneiderman* as to the nature, methods and purposes of Marxism-Leninism in 1927 or before, or as to the character of Schneiderman's beliefs, teachings and activities in 1927 or before", was a determination favorable to him of facts essential to a conviction upon the indictment here (Br. in Opp. p. 52).

In order to determine whether or not this Court's conclusions in *Schneiderman* were determinations favorable to him here, it is necessary to examine what this Court's conclusions were there, and to determine how the goverment sought to prove its case here.

1. The pleadings in Schneiderman demonstrate the identity of the issues.

Schneiderman was commenced by the filing of a complaint in which the government sought petitioner's denaturalization upon the grounds of illegality and fraud. The complaint charged that Schneiderman, prior to, at the time of, and subsequent to his naturalization, had been a member of and affiliated with, and personally believed in the principles of, the Communist Party, which principles it

was alleged "advised, advocated and taught the overthrow of the government, the Constitution and the laws of the United States by force and violence" (App. Item 100, pp. 374-376).

Schneiderman's answer admitted his membership in the Communist Party but denied that the party had the principles claimed for it by the government. Furthermore, Schneiderman filed a separate defense in which he specifically denied that the Communist Party ever taught and advocated the overthrow of the government of the United States by force and violence; in which he affirmatively alleged that the Communist Party, on the contrary, taught and advocated the defense of the democratic liberties of the American people and the defense of the Constitution of the United States; and in which he affirmatively set forth the Constitution of the Communist Party to demonstrate its rejection of the use of force and violence as an instrument of social change. He also denied that he personally believed in and advocated the, or any, proscribed doctrine (App. Item 101, pp. 379-383).

Thus the pleadings demonstrate that the issues in *Schneiderman* were (1) whether or not the Communist Party by teaching Marxism-Leninism was necessarily advocating the overthrow of the government of the United States by force and violence, and (2) whether or not Schneiderman himself believed in and advocated forcible overthrow of government.

2. The trial record in Schneiderman demonstrates the identity of the issues.

At the trial, which occurred in 1939, the United States Attorney stated that the government expected to show that prior to and at the time of the filing of his declaration of intention, at the time of filing his petition for naturalization, at the time of his admission to citizenship, and "up to the present time", Schneiderman was a member of organizations which taught the unlawful doctrines and himself believed in and advocated such doctrines (App. Item 102, p. 384, Ex. MM-1, pp. 70-71).[13]

Voluminous testimony was introduced on both sides, practically every bit of it relating to the principles of Marxism-Leninism and their interpretation on the question of force and violence, the teaching and advocacy of such principles by the Communist Party, and the knowledge and intent of Schneiderman with relation thereto.

Schneiderman himself testified at great length and was subjected to an extended cross-examination. He unequivocally avowed his belief in the "essential correctness of the Marx [*sic*] theory" and the "philosophy and princi-

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[13]During the course of the trial the United States Attorney repeated this contention on a number of occasions and offered evidence "to exemplify what his [Schneiderman's] state of mind was at that time" (Ex. MM-1, p. 151) and to show his "conduct" and "belief" in order to determine the issue of his attachment to the Constitution (Ex. MM-1, p. 329).

During the argument on a motion for a nonsuit at the conclusion of the government's case, the United States Attorney said:

> "The evidence from these books . . . professes a belief in the policy of Marx and Engels, Lenin and Stalin . . .
>
> "It is our contention that . . . they advocate force and violence; and we believe that a reading of the books . . . shows they contemplate the use of force and violence to bring this about." (Ex. MM-1, pp. 350-351.)

ples of socialism as manifested in the writings of Lenin" (Ex. MM-1, p. 103).[14] He denied, however, and categorically, that the theory or the principles and philosophy as he understood them constituted advocacy of forcible overthrow of government (Ex. MM-1, pp. 369, 373, 376, 395).[15] As to his own hopes and beliefs, Schneiderman testified:

> "Q. Do you believe that it will be possible to bring about this socialization by democratic processes in this country?
>
> A. Yes, I do; and I certainly hope so" (Ex. MM-2, p. 867).

Absent proof that Schneiderman personally harbored any unlawful intent or committed any overt act[16] manifesting his adoption of a reprehensible interpretation of

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[14]He understood Marxism to be "a philosophy and a science [which] delves into the theory of politics and economics and all of the social forces" (Ex. MM-1, p. 108) and a "science which embodies a whole series of economic, political, sociological, moral and philosophical concepts, and a method of seeking and applying human knowledge to the needs of society." (Ex. MM-1, pp. 370-371.)

[15]Schneiderman understood that Communists "do not desire the use of force and violence [but] desire and strive for peaceful and democratic means of removing exploitation and poverty." (Ex. MM-1, p. 373.) He understood further that "This can only be achieved when the majority of the people choose to follow the socialist path by democratic processes." (Ex. MM-1, p. 395.) His view was that only by misrepresentation and distortion could Marxism-Leninism be equated with the advocacy of force and violence as a method of social change (Ex. MM-1, pp. 369-370; 376).

He adopted for himself the extended expressions of two Stanford professors, Harold Chapman Brown and Walter Thompson (Ex. MM-1, p. 475) in which the concept that Marxism-Leninism may be equated with force and violence was rejected (Ex. MM-1, pp. 562, 721, 743).

[16]A police officer who had had Schneiderman under surveillance for years admitted that to his knowledge petitioner had never committed an act of force or violence or indeed any unlawful act

Marxist theory, the prosecution fell back upon the device of reading (as it did here) from isolated passages taken (usually out of context) from the so-called "classics" of Marxism-Leninism. It argued (as it does here) that those excepts permitted an inference that the theories under study did in fact call for forcible overthrow of government, and then proceeded to build the whole structure of inferences required (but, as argued in co-petitioner Yates' brief in No. 6, not legally allowable) to reach the result sought.

While the applicability of the doctrine of *res judicata* and collateral estoppel are not dependent upon a finding that identical evidence was introduced in both cases, it is significant to note that, as will be seen, the documentary evidence introduced in *Schneiderman* was substantially identical with that introduced here. Thus the prosecution relied there, as it does here, on the so-called "classics" to establish its fundamental premise that the teaching of Marxism-Leninism is necessarily the advocacy of forcible and violent overthrow of the government of the United States.

3. The opinions of the lower courts in Schneiderman demonstrate the identity of the issues.

After the matter was submitted to it, the District Court filed a written opinion (33 F.S. 512 [N.D. Calif.]), noting that the government had "placed in evidence many volumes of books and pamphlets which explain the doctrines

(Ex. MM-1, pp. 342-343). What this Court said earlier is equally true now:

> "... there is nothing in the record indicating that he was ever connected with any overt illegal or violent action or with any disturbance of any sort." (320 U.S. at 126.)

of Marx, Engels, Lenin and Stalin, upon which the principles and practices of the Communist Party and its predecessor organizations are based"; that the government had "called upon three witnesses, including defendant, to explain the position of the Communist Party . . . with respect to Communist ends and means"; and that Schneiderman's conduct threw light on his "state of mind" during the probationary period. The Court stated that from the foregoing it reached the conclusion that the Communist Party sought to establish the dictatorship of the proletariat, and that "methods of force and violence" are accepted and necessary to achieve that end, and consequently that the Communist Party "taught and advocated the overthrow of the government by force and violence."[17] A decree revoking Schneiderman's citizenship was accordingly entered.

The appeal to the Court of Appeals challenged the sufficiency of the evidence to support the findings of the District Court that Schneiderman and the Communist Party believed in or advocated the overthrow of the government of the United States by force and violence. It was asserted on the appeal that the evidence did not establish that either Schneiderman or the Communist Party "believed in the overthrow of the government by force

[17]In accordance with these views the District Court made findings of fact that Schneiderman "was a member of and affiliated with and believed in the principles of . . . the Communist Party . . . which . . . advised, advocated and taught the overthrow of the government, Constitution and laws of the United States by force and violence . . ."; that Schneiderman intended to "adhere to and support and defend and advocate the principles and teachings . . . which . . . advised, advocated and taught the overthrow of the government, Constitution and laws of the United States by force and violence" (App. Item 103, pp. 385-387).

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and violence, or advocated or taught such principles" (App. Item 104, p. 388).

The Court of Appeals (119 F.2d 500 [CA 9]) reviewed the history of the case, summarized the pleadings and the trial Court's findings, and affirmed the judgment upon the ground that *since there were sharply conflicting views on the question of whether the teaching of Marxism-Leninism was necessarily the advocacy of violent overthrow of government*, it could not say that the findings of the trial Court were "clearly erroneous".

4. The opinions in this Court in Schneiderman demonstrate the identity of the issues.

In this Court the government pressed its contention that Schneiderman was not attached to the Constitution because he believed in the use of force and violence instead of peaceful means to achieve his desires. Its argument was that the Communist Party of which petitioner was a member advocated and taught such doctrine and that petitioner "therefore" believed in that method of governmental change (320 U.S. 146).

The Court stated this contention in the light of the record there made:

> "Apart from his membership in the League and the Party, the record is barren of any conduct or statement on petitioner's part which indicates in the slightest that he believed in and advocated the employment of force and violence, instead of peaceful persuasion, as a means of attaining political ends. To find that he so believed and advocated it is necessary, therefore, to find that such was a principle of the organizations to which he belonged and then impute that prin-

> ciple to him on the basis of his activity in those organizations and his statement that he subscribed to their principles . . .'' (320 U.S. at 146-147).

Thus the two basic issues emerged in this Court: (1) Did the advocacy of Marxism-Leninism constitute the advocacy of forcible overthrow of government;[18] and (2) could such views be imputed to petitioner merely because of his membership or officership in the party.

With respect to the *first* issue, this Court observed that the government, ''with commendable candor'',

> ''. . . admits the presence of sharply conflicting views on the issue of force and violence as a party principle, and it also concedes that 'some Communist literature is susceptible of an interpretation more rhetorical than literal.' '' (320 U.S. at 148.)

While the government is apparently less candid today, it was no less vigorous a decade ago in arguing its claims.

> ''It insists, however, that excerpts from the documents on which it particularly relies are enough to show that the trial court's finding that the Communist Party advocated violent overthrow of government was not 'clearly erroneous.' '' (320 U.S. at 148.)

This Court reviewed the Marxist literature relied upon by the government—and indeed the entire record made by it—and found that it had not been established clearly and convincingly that the Communist Party engaged in ad-

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[18]It was to support a finding that "such was a principle" of the party that the government had introduced the "many volumes of books and pamphlets which explain the doctrines of Marx, Engels, Lenin and Stalin . . ."

vocacy of force and violence. Reviewing the government's evidence on this phase of the case, this Court found it to be insufficient to compel the conclusion that the teaching of Marxism-Leninism necessarily meant the advocacy of violent overthrow.

> "A tenable conclusion . . . is that the party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open." (320 U.S. at 157.)

On the *second* issue of whether party doctrine could be imputed to Schneiderman merely because of his membership and officership in the party and participation in its legal activities, the Court said:

> "We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can reexamine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation." (320 U.S. at 158.)

Thus were both issues resolved here favorably to petitioner.

B. The Marxist-Leninist literature considered in Schneiderman was substantially identical with that relied upon here.

Turning now to the literature upon a review of which this Court drew its tenable conclusion, we note first that it was substantially identical with that upon which the government relies here:

1. The Constitution of the Communist Party of the United States (Ex. 5 in *Schneiderman*, Ex. 27 here).
2. Program of the Communist International (Ex. 6A in *Schneiderman*, Ex. 59 here).
3. The Communist Manifesto (Ex. 7A in *Schneiderman*, Ex. 39 here).
4. Lenin's State and Revolution (Ex. 8A in *Schneiderman*, Exs. 11 and 607 here).
5. Lenin's Left-Wing Communism (Ex. 9A in *Schneiderman*, Ex. 503 here).
6. Stalin's The Theory and Practice of Leninism (Ex. 11A in *Schneiderman;* this appears to be substantially identical to Stalin's Foundations of Leninism, Ex. 1 and 606 here).

A brief analysis of the contents of these books, read at length to the jury, quoted at comparable length in brief and appendix below, and which this Court may expect to see once more *in extenso* when the government replies, shows clearly the identity of the propositions previously litigated with those the government urges again to sustain the conviction. Closer examination reveals that not only does the government rely on the same books in both cases to prove the same proposition, but in decisive in-

stances reliance is on identical excerpts from the same books. The government in its brief to the Court of Appeals conceded its heavy dependence on a comparatively few quotations,[19] practically all of which were considered in *Schneiderman*. Finally, where other and different books are found in evidence here, the government's thesis is that such books argue the same propositions, carry the same message, and contain the same proscribed advocacy as the books used before.

Clearly, the government is estopped to relitigate with petitioner on these terms exactly what it sought vigorously, but unsuccessfully, to sustain through the same courts twelve years earlier.

For example, the government refers meaningfully to a quotation from the *Paris Commune* by Lenin (Ex. 492). True, the *Paris Commune* does not appear to have been in evidence in *Schneiderman*, but the government's reference to it is revelatory. It reads, in part:

> "Substantially, the same definition of revolution is quoted twice in the *Paris Commune*. (Ex. 492). See, *ibid*, page 40. (A. 541) The same definition of revolution is found in *State and Revolution*. (Ex. 11, p. 53) It is also found in the *Proletarian Revolution and the Renegade Kautsky* (Ex. 504, p. 23) . . ." (Appellee's Brief in the Court of Appeals, p. 200, n. 74.)

The definition from the several sources, all in evidence here, thus assumed maximum importance to the government. Extensive reliance was placed upon it, both by the prosecutors below, and by their predecessors in *Schneider-*

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[19] In footnote 69, page 192 of that brief, the government said: "Some of the quotations are repeated elsewhere in whole or in part."

man. It reads (composing minor differences in translation as it appears in the considerable variety of sources):

> "I beg respectfully to remind Mr. Kautsky, who knows Marx and Engels by heart, of the following evaluation of the Commune by Engels from the point in view of 'pure democracy'.
>
> Have these gentlemen (the anti-authoritarians) ever seen a revolution? Revolution is undoubtedly the most authoritarian thing possible. It is an act by which one section of the population imposes its will on the other by means of rifles, bayonets, cannon, i.e., by highly authoritative means, and the victorious party is inevitably forced to maintain its supremacy by means of that fear which its arms inspired in the reactionaries . . ."[20]
>
> The necessity of systematically fostering among the masses this and only this point of view about violent revolution lies at the root of the whole of Marx's and Engels' teaching, and it is just the neglect of such propaganda and agitation both by the present predominant Social-Chauvinists and the Kautskyian schools that brings their betrayal of it into prominent relief."

This passage, described by this Court in *Schneiderman* as one of the "bombastic excerpts" from Communist literature, and there deemed insufficient to clothe petitioner with advocacy of overthrow of this government by

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[20]This quotation is in evidence in *Schneiderman* (see Ex. MM-2, p. 706), where the witness Thompson, a professor of political science at Stanford University (Ex. MM-1, p. 475) states that the language can be understood only in light of its historical context (Ex. MM-2, p. 706-7). Professor Thompson's "interpretations" were "recognized" by Schneiderman as "authority" (Ex. MM-1, p. 475).

force and violence, gained repeated attention upon the trial and in the Court of Appeals here.

Despite its treatment by this Court in the earlier case (see 320 U.S. 149, note 36), the identical quotation was again set forth in *haec verba*, to the jury and to the Court of Appeals, by the government here. As examples, not suggested as exhaustive, the language appears in whole or in part at pages 155, 200 and 281, of the government's brief in the Court of Appeals, and in addition at pages 483, 487 and 541 of the Appendix to that brief.

As has been seen, this Court in *Schneiderman* found the conclusion tenable that petitioner, based on his own testimony there, did not subscribe to the doctrine of advocacy of forcible overthrow of the government, nothwithstanding this or subsequent quotations from Marxist-Leninist works. Upon the trial below, co-petitioner Yates testified at length (and see her brief in No. 6) concerning her understanding of these same books or quotations. Asked, for example, about the foregoing excerpt, she noted that it was written "in a period in which there was absolutism, tyranny, in Europe and on the continent or in which the people had no[t] way of expressing themselves . . ." (R. 11526).[21] She added the important observation that the writer was at the time, as was clear when the quotation was read in context, engaged in a polemic against the Anarchists, who held the view that no state whatever would be necessary after the working class should come to power (*id.*).

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[21] Almost fifteen years earlier, Schneiderman, too, had emphasized the importance of evaluating Marxist-Leninist writings in the context of the time, place and circumstances in which they were written (Ex. MM-1, pp. 123, 379).

Petitioner Yates believed her understanding of Marxism-Leninism to be consistent with the Court's analysis in *Schneiderman* (R. 11013-15), and she and petitioner Schneiderman were in substantial agreement on what the doctrines meant to them (R. 11730).

2. Another typical example of the utilization of the some paragraphs, first in *Schneiderman,* and again here, is from the Communist Manifesto:

> "The Communists disdain to conceal their views and aims. They openly declare that their ends can be obtained only by the forcible overthrow of all existing social conditions."

This appears in *Schneiderman* at 320 U.S. 149, note 35, again at 320 U.S. 191.[22] As Exhibit 39 here, the same words appear in the Appendix at page 502 and in the Reporter's Transcript at, *inter alia,* R. 11562-3.

Exactly this excerpt was discussed by co-petitioner Yates on cross-examination (see R. 11563-5). Like petitioner's, her understanding of the quoted language is that it refers only to a fundamental process of social change. Her detailed analysis fully accords with the tenable conclusion that circulation of the Manifesto does not at all mean that petitioner or the Communist Party sought thereby to advocate overthrow of the government by force and violence, or agreed to do so.[23]

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[22] It was introduced as Exhibit 7A in *Schneiderman* and the identical paragraph was read into the record of that case (Ex. MM-1, p. 127).

[23] This was precisely Schneiderman's understanding when he testified concerning this very language in 1939 (Ex. MM-1, p.

3. Again, Engels is said to have sung a "panegyric ['hymn' in some translations] to violent revolution." Despite the fact that this language was before the Court in the earlier case (320 U.S. at 204), the attention of the Court of Appeals was assiduously directed to the same thing, not only at pages 154, 155, and 281 of the government's brief, but once more at page 483 of the Appendix. As a further example, this Court was told before that the program of the Communist International, adopted in 1928, declared revolution to be necessary, among other things, because "only in the process of revolution is the overthrowing class able to purge itself of the dross of the old society and become capable of creating a new society." (320 U.S. 152, note 39a.) The identical document was introduced in the trial below as Exhibit 59,[24] and the government repeatedly called attention to this recommended purging of the dross of old society; at pages 25 and 199 of its brief in the Court of Appeals, and yet again at page 585 of its appendix to that brief. Again attention was directed here to a quotation reading, "the proletarian revolution is impossible without the violent destruction of the bourgeois' governmental machine and the putting of a new one in its place." Utilized before (see 320 U.S. 191),[25] the same quotation appears in a book under a new title in the trial below. In this case the given quotation is found in Foundations of Leninism, Ex-

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[24] In *Schneiderman*, it is Exhibit 6A and the language quoted by the government appears at Ex. MM-1, p. 116.

[25] The document is Exhibit 11A in *Schneiderman* and the quoted language appears at Ex. MM-1, p. 217.

hibits 1 and 606, and is set forth in substance at pages 161 and 198 of the government brief in the Court of Appeals, and again at 471 of the appendix. The last citation indicates that the same quotation appeared not less than six times in the reporter's transcript: pages 1472, 1475, 2191, 11690, 11694, 11697.

This quotation, like the others here considered, was described by co-petitioner Yates in her testimony below to be polemical, directed against one Kautsky and the Anarchists, and to "bear the imprint" of the period in which it was written: 1917, "during the period of the civil war in the Soviet Union" (R. 10914). Compare what this Court said in *Schneiderman:*

> "Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written." (320 U.S. at 154.)

4. Another related set of quotations has had the government's serious attention both in *Schneiderman* and in this case. It appears, from the books in evidence, that Marx once wrote that he contemplated the possibility of a peaceful revolution in England and America. Subsequently both Lenin and Stalin are said to have discussed this possibility, saying that events had so changed that "Marx's restriction no longer applies", or "This qualification made by Marx is no longer valid." This thesis, quoted in full by both majority and minority opinions (see 320 U.S. 155; and 320 U.S. 193) may be found thrice more, in the government's brief in the Court of Appeals at pages 155 and 156, and at pages 470 and 485 of the appendix. In some places the quotation is from *Foundations of Leninism,* Exhibits 1 and 606, and in other places

from *State and Revolution* by Lenin, Exhibits 11 and 607.[26]

The significance of this change from Marx to Lenin, as she understood it, was similarly the subject of testimony by co-petitioner Yates. At R. 10943 *et seq.*; she cited the instance as "a case which demonstrates that Marxists-Leninists will alter their conclusions as new facts emerge and develop . . .", and gave as a further example the fact that Lenin in 1917 did not foresee "the development of the struggle against fascism and the possible new conclusions that would have to be drawn as a result of that particular struggle in the world of 1952" (R. 10947).[27]

5. Perhaps the most abundant repetition of all, and in both proceedings, has been accorded those passages from the books in evidence dealing with the concept of the dictatorship of the proletariat, and what this Court in *Schneiderman* termed "the erection of a new Proletariat state upon the ruins of the old bourgeois state." This process appears to have been treated in the books in evidence in such terms as "annihilation of the old state", or "smashing its bureaucratic machinery", or "breaking up its old apparatus". Verbs of this forceful character were subject to reiterated use by the prosecutors in both proceedings. Quotations including them accordingly may be found in 320 U.S. at pages 149, 150, 151, 152, 153, 195, 201, 206 and 207. Quoting from a series of exhibits in

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[26] In *Schneiderman* it is Exhibit 11A and the language is quoted at Ex. MM-1, p. 216.

[27] In *Schneiderman* a government witness pointed out Marxists "changed their interpretation" (Ex. MM-1, p. 207). The argument around this point is developed more fully in the brief of co-petitioner Yates in No. 6.

evidence here, the government in the Court of Appeals quoted and requoted the same thing at pages 24, 161 and 177 of its brief, to say nothing of pages 469, 471, 484, 485 and 542 of its appendix.

However, it was the understanding of co-petitioner Yates, who interpreted Marxism-Leninism in substantially the same fashion as petitioner (R. 11730), that the language in question was related to slogans familiar in American politics: "Smash Tammany Hall" or "Break Up the Pendergast Machine" (R. 10891, *et seq.*) Referring to a quotation from *The Paris Commune* (Ex. 492), she described her understanding of the process:

> "Well, that means to me that the machinery of one type of state is replaced by the machinery of another type of state. The machinery that has been built up, as Shaw stated, to replace capitalism is replaced by the machinery that is built up to replace socialism, and that this is a necessary process in the construction of a new social order." (R. 10894)[28]

Moreover, asked directly if exactly what this Court said in *Schneiderman* about "the concept of the dictatorship of the proletariat (320 U.S. at 142) was in accord with her understanding of the meaning of the term, she replied, "Yes it is." (R. 11003-4.)

This Court in *Schneiderman*, having before it the same ideas in exactly the same powerful language and generally from the same books, determined that "the concept of the dictatorship of the Proletariat is one loosely used,

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[28]The testimony of Professor Thompson, which it will be remembered, was accepted by Schneiderman as "authority", dealing with these same concepts, was to the same effect (Ex. MM-2, pp. 743-45).

upon which more words than light have been shed." (320 U.S. at 142).[29]

This demonstration, by no means exhaustive, shows that what the government is relying upon here is precisely what it relied upon in *Schneiderman*.

In *Schneiderman*, the government admitted and the Court found that the evidence with respect to the "crucial issue of advocacy of force and violence" by the Communist Party was in sharp conflict (320 U.S. at 155). That conflict, the Court there said, "is not eliminated by assiduously adding further excerpts from the documents in evidence to those culled out by the government." Nor was the government entitled here to relitigate the same issue exactly by assiduously adding to the record new books that say the same things.[30]

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[29]Other quotations which may be similarly analyzed appear repetitively in both proceedings, viz.:

One, from the *Program of the Communist International* (Ex. 59), deals with the asserted significance attached by the authors of the books to immediate or present slogans and demands, as these relate to the ultimate aims of the Communist Party. Substantially the same message, and from the same source in each instance, may be found in *Schneiderman* as Ex. 6A (See MM-1, pp. 109-112). Despite the fact that it was before this Court then (320 U.S. 150, note 37), it is quoted at length at page 21 of the government's brief in the Court of Appeals here.

Another relates to the significance of the difference between "reformist" and "revolutionary" work. These ideas, also carefully considered by this Court as they affected petitioner twelve years ago (320 U.S. 151, note 38), have now appeared repeatedly again below. They are found in Government's Exhibits 1 and 606, *Foundations of Leninism*, and are quoted in full in the government's brief in the Court of Appeals, both at pages 167 and 291. No doubt for emphasis, they again appeared in the appendix to that brief in the Court below at page 478, referring there to their use at the trial at pages 1503 to 1506 of the reporter's transcript.

[30]In the Courts below in the instant case the government made much of the language to be found in the dissenting opinion of

C. The government's appraisal of Marxism-Leninism cannot be imputed to petitioner.

As we have seen, this Court has already held that where a plurality of interpretations of an organization's program may legitimately be made, an unlawful or reprehensible one will not in the absence of supporting evidence of overt acts, be imputed to a respondent in a denaturalization case. Certainly the law can be no different in the case of a defendant in a criminal conspiracy case.

Furthermore, as more fully developed in the brief in No. 6, the variety and sometimes the contrariety of views even within the party as to the proper or "correct" analysis, or interpretation of Marxism-Leninism, the changes from time to time, the conflicts in and shifting of interpretations, make the imputation of any specific view to any specific individual at any specific time a matter of the greatest conjecture and speculation. Petitioner's conduct, as shown by the record, belies the government's contention, and the absence of any overt acts to support that contention is decisive.

Here the record goes further and presents the anomalous situation of the government insisting upon fastening upon petitioner views, which he not only now, but for three

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Chief Justice Stone in *Schneiderman*. In that opinion the Chief Justice took issue with the majority of the Court not on what were the issues for determination but only upon their resolution. His views confirm and underline that the issue there resolved was the same as the issue the prosecution sought to relitigate here:

> "There is abundant documentary evidence of the character already described to support the court's findings that the Communist Party organizations of which petitioner was a member diligently circulated printed matter which advocated the overthrow of the government of the United States by force and violence . . ." (320 U.S. at 190).

decades of his adult life, has emphatically and articulately rejected.

Not only for reasons already stated by this Court, but for those abundantly revealed by this record, no reprehensible interpretation of Marxism-Leninism can be imputed to petitioner.

D. Under the legal principles applicable to the facts of the two cases, the prior adjudication is a bar to this proceeding.

Following the reversal of the judgment by this Court, mandates in the usual form were ultimately spread upon the minutes of the District Court. Thereafter, the naturalization certificate which had previously been surrendered to the Clerk of the trial court was returned (Exs. MM-3, MM-4 and MM-5). Thus the issues between the parties were disposed of by an adjudication which was accepted as final by the government. The principles of *res judicata* and collateral estoppel became applicable thereafter. *Sealfon v. United States*, 332 U.S. 575; *United States v. Baltimore & Ohio RR. Co.*, 229 U.S. 244; *Southern Pacific Ry. Co. v. United States*, 168 U.S. 1.

It is immaterial that in the case at bar the form of the action was a criminal conspiracy for as we have seen, the issues drawn by the indictment and the plea were identical in all essential respects with the issues posed in the naturalization proceeding.[31]

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[31]Since "[t]he core of the two cases was the same" (*United States v. Williams*, 341 U.S. 58, 63), the principles of either *res judicata* or collateral estoppel apply. *Sealfon v. United States*, 332 U.S. 575, 578.

Conceivably the prosecution might have made a new and different issue respecting the books from that which we litigated before by producing evidence of "changed conditions". *United States v. Baltimore & Ohio RR. Co.*, 229 U.S. 244, 254. This would necessarily have had to consist of some new or different *use* by Schneiderman of the basic Marxist-Leninist books, or of a new or different *understanding* by him of the books in question.

But it is clear from the record that nothing was added by the evidence below to that which the government presented in the denaturalization proceeding. In that proceeding it was the books, and the books alone, that established the principles of Marxism-Leninism which the government charged contained the forbidden advocacy. Here it is precisely the same thing. There is no suggestion in the record here of if, how or when Schneiderman *used* the books in a new or different manner from the way in which he used them prior to his denaturalization proceeding. In each case they were simply circulated, distributed and studied for their content. Indeed, the government insisted in both proceedings that the books "speak for themselves".

As to Schneiderman's *understanding* of the books, of the principles of Marxism-Leninism, and of the significance of the circulation of the books and the adoption of their principles by the Communist Party, the record not only fails to show a change, something new for the government to litigate, but it shows affirmatively that there was no change. It shows that Schneiderman and the party warmly greeted this Court's holding that it was a "tenable conclusion" that the party sought socialism by peaceful and

democratic means, declared that this was a correct statement of their understanding of the principles of Marxism-Leninism and printed and circulated copies of the Court's opinion (Ex. KU; R. 11,002). This was exactly Schneiderman's position in that proceeding and this is exactly what he litigated with the government. Therefore, his understanding of Marxism-Leninism, according to the record in this case, had shifted not one bit from what it was when that crucial issue was tried in 1939.

This Court has stated that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in subsequent litigation between the same parties, "and even if the second suit is for a different cause of action, the right, question, or facts once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific Ry. Co. v. United States*, 168 United States 1, 48-49.

For the purposes of this case it is immaterial whether the applicable doctrine be called *res judicata* or collateral estoppel. In the latter situation it has been held that

> ". . . where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted upon the determination of which a finding or verdict was rendered' . . . *But matters which were actually litigated and determined in the first proceeding can-*

> *not later be relitigated.* Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel." (*Commr. of Internal Revenue v. Sunnen,* 333 U.S. 591, 597, 598.)

See also *Cromwell v. County of Sac,* 94 U.S. 351, 352-53.

Under the doctrine of these and other cases, the prior decision with respect to the factual issues of the meaning of Marxism-Leninism and Schneiderman's understanding regarding it, would constitute a bar to this indictment by way of collateral estoppel rather than *res judicata.*[32]

It is clear that a party may not relitigate any issue theretofore litigated no matter in how many different forms it casts its action. For example, a determination in a criminal proceeding has been held to be a bar in a civil proceeding (*Coffey v. United States,* 116 U.S. 436); a determination in an admiralty proceeding has been held to be a bar to a civil action (*Gelston v. Hoyt,* 3 Wheat. 246); a determination in an injunction suit has been held to be a bar to an action for damages (*United States v. Munsingwear,* 340 U.S. 36).[33] The question in each case is not what was the form of the action by which the issues

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[32]However, the distinction in terminology is not always closely observed. See *United States v. Baltimore & Ohio R. R. Co.,* 229 U.S. 244, 253, wherein an issue determined in an equity proceeding was "properly held to be *res judicata* as to the facts averred" in a subsequent criminal indictment involving the same issue.

[33]Indeed, these principles have been held applicable to the decisions of administrative tribunals (*Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381; *Louisville & Nashville Ry. Co. v. Ohio Valley Tie Co.,* 242 U.S. 288).

were determined, but rather, what issues were determined (*New Orleans v. Citizens Bank,* 167 U.S. 371).

This must be especially true where, as here, the prior litigation had sought consequences "more serious than a taking of one's property, or the imposition of a fine or other penalty" (*Schneiderman v. United States;* 320 U.S. 118, 122), and where the standard of proof in the prior litigation was "substantially identical with that required in criminal cases—proof beyond a reasonable doubt" (*Klapprott v. United States,* 335 U.S. 601, 612).

For purposes of *res judicata* or collateral estoppel, an examination must be made of the content, and not merely the form, of the Court's decision, in order to ascertain the Court's intent as to the scope and finality of its ruling upon an issue. *In re Potts,* 166 U.S. 263; *Sewerage Commission v. Activated Sludge, Inc.,* 81 F.2d 22 [7 Cir.]; *Cleveland v. Second National Bank and Trust Co.,* 149 F.2d 466 [6 Cir.]. Here this Court clearly declared its intention finally to adjudicate the issues presented to it in the prior case.

> "This disposes of the issues framed by the government's complaint which are here pressed." (320 U.S. 118, 159.)

Those issues, as we have seen, are basically the same as the issues framed in the indictment which the government seeks to press once again. Clearly, this Court's determination of those issues forecloses the government from relitigating them.

Res judicata and collateral estoppel apply to the holdings of appellate as well as trial Courts. *In re Potts,*

166 U.S. 263; *In re Sanford Fork and Tool Co.*, 160 U.S. 247; *Duncan v. Gegan*, 101 U.S. 810.[34] Nor can there be any distinction made between the finality which attaches to an order of reversal and one of affirmance. *Southern Pacific Ry. Co. v. United States*, 168 U.S. 1, 41; *In re Potts*, 166 U.S. 263, 267.

This Court has long since rejected the contention that the principles of *res judicata* and collateral estoppel do not apply to criminal cases and that the principle against repetitious litigation is applicable in criminal cases only to the extent that it is embraced within the narrower confines of the double jeopardy provision of the Fifth Amendment. *Sealfon v. United States*, 332 U.S. 575; *Frank v. Magnum*, 237 U.S. 309; *United States v. Oppenheimer*, 242 U.S. 85.

Indeed, it has been held that even though the burden of proof differs between civil and criminal cases, *res judicata* may apply in such situations.

> "This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States is the party on the one side, this claimant is the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. *This was ascertained once for all between the United States and*

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[34] "Before the suit . . . was removed . . . the rank of the appellant's mortgages had been finally settled by the judgment of the Supreme Court of the State on appeal. That was no longer an open question between the parties . . ." (101 U.S. at 812, 813).

> *the claimant,* in the criminal proceeding, *so that the facts cannot again be litigated between them,* as the basis of any statutory punishment denounced as a consequence of the existence of the facts." (*Coffey v. United States,* 116 U.S. 436, 444.)[35]

Controlling on the question here is the holding that a federal criminal prosecution may be barred by the fact that an essential issue was adjudicated favorably to the defendant in a prior civil case in which the United States was plaintiff. *United States v. Baltimore & Ohio R. R. Co.,* 229 U.S. 244. There, as here, a civil action was followed by a criminal prosecution. In the civil action the United States had sought unsuccessfully to enjoin the maintenance of a bridge on certain navigable waters. In denying the relief sought, the Court held that the bridge in question was not subject to the statute relied upon by the government. Thereafter, the government indicted the same defendant, pursuant to the penal provisions of the same statute. This Court affirmed the direction of a not guilty verdict upon the ground that the prior adjudication barred the government.

> "We are of the opinion therefore that as against action by the Secretary of War, the decree in the equity case was properly held to be res judicata as to the facts averred in the indictment and as decisive of the question that in the absence of changed conditions, the bridge in question was not subject to the Act . . ." (229 U.S. at 253-54.)

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[35] This Court has pointed out that there is no substantial difference between the burden of proof required in a denaturalization case and that required in a criminal case (*Klapprott v. United States,* 335 U.S. 601, 612).

So here, absent "changed conditions", the decree in *Schneiderman* bars the government in this proceeding.

Res judicata and collateral estoppel have been applied not only to the ultimate issues decided in the prior adjudication, but also to evidentiary or intermediate issues either necessarily decided or shown to have been actually decided in the earlier cases. *Sealfon v. United States*, 332 U.S. 575; *United States v. Baltimore & Ohio R. R. Co.*, 229 U.S. 244. In determining what questions were adjudicated in the prior case, the entire record, including pleadings, testimony, exhibits, etc., may be examined. *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316. The examination of the record in *Schneiderman* demonstrates without question that the points which the government seeks here to adjudicate were there determined.

Additionally, it is clear that the effect of the doctrines of *res judicata* and collateral estoppel cannot be avoided merely by bringing in more proof, adding new elements to the charge, or bringing forward new witnesses. *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683; *City of New Orleans v. Citizens Bank*, 167 U.S. 371.

Nor can the judgment below be sustained on the basis of evidence dealing with events subsequent to 1943 or 1939 or 1927 (whichever may be the critical date for Schneiderman) because this Court is in no position now to determine upon what evidence the general verdict of the jury was based. *Stromberg v. California*, 283 U.S. 359, 367-68. The question is whether the issue which went to the jury was in whole, *or in part*, the same issue as had been litigated before. *Southern Pacific R. R. Co. v. United States*, 168 U.S. 1, 48; *United States v. Baltimore*

& Ohio R. R. Co., 229 U.S. 244; *Sealfon v. United States*, 332 U.S. 575, 578. Furthermore, any such "additional" evidence was palpably insufficient to sustain the conviction or to controvert that Schneiderman, both here and in his earlier case, never intended to advocate and teach the forcible overthrow of government and did not understand the principles of Marxism-Leninism to include such overthrow.

In view of the prosecution's emphasis upon the proposition that the doctrines of Marxism-Leninism were essentially the same from 1848 onward, that the party in the United States advocated unlawful doctrine from 1919 onward, that Schneiderman's unlawful knowledge and intent were contemporaneous with his joining the party in 1922, it was the plain duty of the trial judge to instruct the jury that these issues (even if considered only evidentiary or intermediate questions) had actually been decided in the prior litigation. Cf. *United States v. De Angelo*, 138 F.2d 466, 468-69 (3 Cir.). By the exclusion of the entire question of *res judicata* or collateral estoppel from the case at every stage, the trial judge, sustained by the Court of Appeals, made any consideration of the impact of the prior litigation entirely impossible.

CONCLUSION.

For these reasons, the judgment as to petitioner Schneiderman must be reversed.

August, 1956.

Respectfully submitted,

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(Appendix Follows.)

Appendix

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

18 U.S.C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government;

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force of violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U.S.C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U.S.C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or pro-

priety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction . . ."

18 U.S.C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any

act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.